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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1554

JAMES O. MING,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE
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JAMES O. MING,

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Respondent.

ENTRY OF APPEARANCE

William J. Beiswanger, Esquire, hereby enters his appearance before the United States Supreme Court on behalf of James O. Ming, Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO
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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, James O. Ming, hereby petitions for a Writ of Certiorari to review the Order of the Court of Claims affirming the decision of the United States Civil Service Commission, Board of Appeals and Review (hereinafter referred to as "Commission").

On June 16, 1972 Petitioner's services as an employee of the Atlantic Undersea Test and Evaluation Center (AUTEC), branch of the Naval Underwater Systems Center (NUSC), were terminated after 29 years of satisfactory Government service of which the last 5 years were with the Agency. Grounds given

by the Agency for the severance was Reduction-in-Force (hereinafter referred to as "RIF").

At severance Petitioner's job title was "Physicist (General), GS-1310-13" and his job position with the Agency was "Electronics Engineer/Physicist". In addition, for purposes of retention and reemployment, Petitioner was a preferential employee holding the highest preference rank, viz., IA.

The Agency alleged that Petitioner's job was abolished as his functions were transferred to RCA, an outside contractor. As part of the RIF, the Agency established for Petitioner, for purposes of retention and reemployment priority, the competitive level of "Physicist" in the competitive area of "West Palm Beach, Florida." Therefore, the Commission held that Petitioner was unable to displace lower ranking employees since he was the only physicist in West Palm Beach. In addition, the Commission held Petitioner had no right to the vacant jobs then being advertised by the Agency in other areas.

Petitioner's appeal to the Commission was based on the assertion that the Agency's action was contrary to the law and regulations, and was so arbitrary and capricious as to constitute bad faith. The Court of Claims upheld the decision of the Commission affirming the Agency's actions.

ORDER BELOW

The Order of the United States Court of Claims dated March 14, 1975 appears in the appendix, Page A-1 - A-2.

JURISDICTION

The Order sought to be reviewed in this case was entered by the United States Court of Claims on March 14, 1975. No petition for rehearing was filed. The statutory provision believed to confer jurisdiction on this Court to review the order in question is 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Claims err in upholding the severance action by the Agency confirmed by the Commission in that Petitioner's termination was so arbitrary, capricious and erroneous as to imply bad faith in that:

a) The Agency did deliberately deceive Petitioner by stating to him that if he returned to West Palm Beach his job would be secure at a time when they knew it was slated for liquidation?

b) The Agency's allegation that job functions were transferred to RCA was totally devoid of any evidentiary support which was readily available and contrary to the substantial, credible evidence presented by Petitioner that his functions were not and could not have been transferred?

c) The Agency did deliberately establish a competitive level and competitive area so narrow and contrary to the regulations as to preclude Petitioner from exercising his

retention and reemployment rights under the law?

d) The Agency failed to furnish Petitioner with a copy of its reply to his appeal to the Commission and, therefore, he was not put on notice as to the grounds for his severance nor the reasons for denial of his retention and reemployment rights?

e) Both the Agency and the Commission failed to grant Petitioner a hearing contrary to the law and Executive Order?

2. Did the United States Court of Claims err in upholding the decision of the Commission whose function it is to prescribe and enforce regulations for the administration of laws and Executive Orders that implement Congressional policy which is that preference in appointment, reinstatement, reemployment and retention shall be given to preferential employees? Petitioner alleges that as the highest ranking preferential employee his lawful rights to retention, reinstatement and reemployment were violated when he was informed that he was unable to displace any employee and to date, or nearly three years after severance, has received no offer for reinstatement or reemployment notwithstanding the Agency was advertising vacancies in those areas of expertise it qualified him for reemployment. Furthermore, in lieu of Petitioner, the Agency reemployed an employee with a lower preferential rank, contrary to the law and regulations that require reemployment be made in preferential order.

3. Did the Court of Claims err in granting Respondent's motion for summary judgment in that Petitioner presented triable issues of fact?

STATEMENT OF THE CASE

1. On April 11, 1972, just 3½ months after transferring from Andros Island, Bahamas to West Palm Beach, Florida, Petitioner was notified that his services with the Agency were being terminated as of June 16, 1972. Appendix Page A-16.

2. On June 7th, 1972, Petitioner filed an appeal to the Director, Boston Region, United States Civil Service Commission upon the grounds set forth in the issues above. Supp. Record 72-2123.

3. On July 28, 1972, the Agency replied by letter to the Commission that there were no similar positions in the competitive area occupied by lower retention status employees and, therefore, Petitioner was unable to exercise any retention rights. Appendix Page A-21. It designated Petitioner's competitive area as West Palm Beach, Florida. Appendix Page A-22. It stated that Petitioner's technical duties and responsibilities were transferred to RCA. (Appendix Page A-24); that the RIF action was the result of a six month long study (Appendix Page A-26); and that vigorous effort would be made to place terminated employees within the Agency, in other Naval and Federal activities inside and outside the commuting area, and if necessary in private industry. Appendix Page A-25 - A-26. No evidence, other than this letter, was submitted by the Agency. Petitioner was not furnished with a copy. Appendix Page A-70.

4. On August 15, 1972, the Boston Region of the Commission upheld the Agency action stating that the competitive level and area complied with the regulations and since Petitioner was the only physicist, Petitioner was not improperly reached for termination. It found that there was a reorganization in that certain functions were transferred to an outside contractor and, thus, Petitioner's severance was not unlawful. Appendix Pages A-9 - A-15.

5. On August 28, 1972, Petitioner appealed this decision to the Board of Appeals and Review. In addition to raising the issues formerly presented, Petitioner objected to the basis of his first appeal to the Regional office stating that he was told by the Agency that his position was to be abolished. Since he was not furnished with a copy of the Agency reply, the first knowledge he had that his functions were transferred to an outside contractor appeared in the decision of the Regional Office. Record 13-31. Appendix Page A-70.

6. On January 19, 1973, the Board of Appeals and Review upheld the decision of the Regional Office. Again it held that the competitive level and area established by the Agency conformed to the regulations and, therefore, Petitioner was not improperly reached for separation. Also, transfer of functions to an outside contractor are matters within the prerogative of the Agency and not subject to review. The Commission elaborated on the point that Petitioner was not offered a position despite the fact that the Agency was advertising vacancies in those areas of expertise which the Agency qualified him for reemployment. It stated that Petitioner had no right to any assignment at Cape Kennedy nor to any other vacancy for an

Agency is not required to fill a vacancy in a reduction in force. Appendix Pages A-2 - A-8.

7. On April 29, 1974, Petitioner filed his petition to the United States Court of Claims, stating that the Agency's actions were unlawful, arbitrary, capricious evidencing bad faith; demanding that Petitioner be reinstated to the same rank and pay level as he would have held had he not been unlawfully discharged and that he be awarded back pay. In addition, he asked the Court to award him punitive damages in the amount of $100,000. In the alternative, Petitioner demanded a trial de novo.

8. On August 19, 1974, Respondent filed motions to dismiss and for summary judgment.

9. Petitioner then filed a response to Respondent's motions and a cross-motion for summary judgment to which Respondent responded on December 3, 1974.

10. Oral argument on the motions was held on March 6, 1975.

11. On March 14, 1975, the Court of Claims issued its Order granting Respondent's motions to dismiss and for summary judgment, dismissing Petitioner's cross-motion for summary judgment. In its Order the Court of Claims held that Petitioner failed to state a claim upon which relief could be granted, and that the administrative action is supported by substantial evidence and is not arbitrary, capricious or so grossly erroneous as to imply bad faith. Appendix Page A-1. It is from this Order that Petitioner files this petition for Writ of Certiorari.

STATEMENT OF FACTS

The facts pertaining to this case show that the Agency's action, as upheld by the Commission was not supported by any evidence and that Petitioner's termination was so arbitrary, capricious and erroneous as to constitute bad faith. The facts as supported by the evidence are voluminous, therefore, they are presented in chronological order corresponding to the periods in which the alleged violations occurred as follows:

A. *Events Leading Up To Notice of Termination*
B. *Events From Notice of Termination to Severance*
C. *Events Subsequent to Termination*

In Summary, Petitioner alleges that he was:

(1) unlawfully separated from service,
(2) unlawfully denied retention rights,
(3) unlawfully denied reemployment rights.

A. *EVENTS LEADING UP TO NOTICE OF TERMINATION*

In summary, Petitioner alleges that the Agency's action during the six months period preceding his transfer back to the United States from Andros Island, Bahamas, was so deceitful as to constitute bad faith. The deceptive acts consist of repeated assurances by the Agency that if Petitioner returned to his old job in West Palm Beach, Florida his position would be secure. The evidence overwhelmingly reveals that the statements were part of a deliberate scheme to

separate Petitioner contrary to the law and regulations.

The entire evidence in support of the Agency's unlawful action consists of its reply submitted the Commission. Appendix Pages A-17 - A-26. The reply makes the following statement: "These RIF actions were based on a six month study of AUTEC, its mission, its requirements, and its personnel. . .". Appendix Page A-26. Using as a point of reference April 7, 1972, the date of the RIF notice (Appendix Page A-16), the "six month study period" could have commenced no later than October 7, 1971. With the exception of the first item listed below, all the enumerated deceptive acts occurred within this period, and it may reasonably be concluded, predicated upon other evidence of deceit, that likewise the August, 1971 act was part of the deceitful scheme to unlawfully terminate Petitioner.

Acts of Deception

1. *August, 1971.* On or about July, 1971 AUTEC ceased to be an independent agency as responsibility for management was transferred to the Naval Underwater Systems Center (hereinafter referred to as NUSC), headquartered in Newport, Rhode Island. Appendix Page A-24. On or about August, 1971, Petitioner was requested to return to West Palm Beach for a conference with two representatives from the Agency who informed him of the transfer of command. Petitioner reviewed his responsibilities with the new Agency personnel and made the point that although he was not directly connected with the data processing group in

West Palm Beach he did work closely with it. The Agency representatives informed him that he was doing a good job and encouraged him to keep it up. Petitioner was relieved of the concern that the change in command may result in certain personnel revisions and eliminations and in particular his job. Appendix Page A-59.

2. *October, 1971.* A manager of the data processing group in West Palm Beach visited Petitioner on Andros Island in October, 1971, again with the purpose of reviewing Petitioner's functions. It appeared to Petitioner that this Agency manager was asking Petitioner if he would consider joining his group, and since Petitioner was preparing for his return to the United States he gave it favorable consideration. Appendix Page A-60.

3. *November, 1971.* While in West Palm Beach on Agency business on or about November, 1971, Petitioner deliberately sought out a personnel administrator regarding his reassignment to West Palm Beach since his two year tour of duty was coming to a conclusion. Although Petitioner was anxious to return to West Palm Beach he had the option of remaining on Andros for another five or six years and preferred this option over separation. One of the primary purposes of this visit pertained to his job security. A personnel administrator put him in telephone contact with a personnel specialist at Agency headquarters in Newport, Rhode Island. Due to numerous rumors that the data process group in West Palm Beach as well as the entire operation may be closed or transferred, Petitioner point blank made inquiry

concerning the future of the West Palm Beach operation and in particular data processing. This specialist informed Petitioner that the data processing group and the entire West Palm Beach function would continue as in the past. Upon these assurances Petitioner requested a transfer back to West Palm Beach which was granted. Appendix Page A-61. This deliberate act of deception occurred approximately four months before the RIF notice or well within the "six month study period" of Agency personnel requirements.

4. *December, 1971.* On or about December 22, 1971 Petitioner was assigned to the data processing group, West Palm Beach. Rumors regarding transfer and liquidation of jobs had not subsided and again Petitioner made direct inquiry concerning his future. The manager of the data processing group informed Petitioner that the Agency told him that it had no intention of terminating any personnel. On these assurances Petitioner purchased a home. Appendix Page A-62.

5. *April 11, 1972.* Petitioner was notified that as of June 16, 1972 his job was terminated for the reason that his position and functions were to be abolished. Appendix Page A-65.

Summary

From August to December, 1971 on several occasions the Agency informed Petitioner that his job in West Palm Beach was secure. Upon these assurances Petitioner transferred from Andros Island to West Palm Beach. By its own admission, the Agency knew that his job was slated for termination yet deliberately

informed Petitioner to the contrary. Petitioner suffered irreparable harm as the result of these deceptive acts as he forfeited his right to remain on Andros Island and the right to reemployment opportunities under the Overseas Placement Assistance Program. The Agency's acts of deception are so arbitrary and capricious as to constitute bad faith. Petitioner's termination is contrary to law.

B. *EVENTS FROM NOTICE OF TERMINATION TO SEVERANCE*

The Agency on or about the time it issued the RIF notice to Petitioner, told Petitioner that they were abolishing his functions and, therefore, were abolishing his position. Appendix Page A-70. In its reply to the Commission, the Agency stated that it had transferred the technical duties and responsibilities to RCA. (Appendix Page A-24. The Agency in the RIF notice (Appendix Page A-16) set Petitioner's competitive level as physicist (General) GS-1310-13, and the competitive area was established in its reply as AUTEC, West Palm Beach, Florida. Appendix Page A-22. Since Petitioner was the only physicist in West Palm Beach, the competitive level and area were so narrowly construed as to effectively preclude him from the right to displace others. In summary, as to this second period, Petitioner alleges that the Agency's actions were so arbitrary and capricious as to constitute bad faith in that:

(i) It presented no evidence that Petitioner's functions were abolished nor were they transferred to RCA. To the contrary, Petitioner presented overwhelming

evidence that his functions were not transferred nor was it within the Agency's power to transfer them to RCA.

(ii) It deliberately set a competitive level so narrow that in conjunction with misrepresenting his qualifications and setting new and higher job standards, Petitioner was denied his retention rights.

(iii) It deliberately set a competitive area (West Palm Beach) so narrow that it is in violation of the regulations pertaining to the establishment and definition of such areas.

(1) *Evidence By Agency That Functions Transferred Totally Lacking*

A. *Agency's Evidence*

The entire record of the Commission proceeding, except for the Agency's reply, was presented by Petitioner on his own behalf. The United States Court of Claims in its Order (Appendix Page A-1) concluded that the administrative action was "supported by substantial evidence". The only evidence on behalf of the Agency is its own reply. Appendix Pages A-17 - A-26. This evidence was not sworn to. Also since Petitioner was not granted a hearing either by the Agency or Commission, nor were the contents subject to examination or cross-examination under oath, thus, the Agency presented no acceptable nor credible evidence on its behalf, yet the Commission ruled on behalf of the Agency solely on the basis of this letter as evidenced

by the fact that the decisions of the Commission contained quotes from it.

The Agency stated that "technical duties and responsibilities are now performed by RCA contractor employees, while some minor administrative functions such as signing of reports, approval of contractor documentation and the like are now performed by other AUTEC employees as required". Appendix Page A-24. This self-serving statement is the sole evidence in support of the Agency's allegation that Petitioner's functions were transferred to RCA. Yet the Commission's decisions, both that of the Board of Appeals and Review and the Boston Region, found that the "record" showed that Petitioner's position was abolished. Petitioner states that this constitutes no evidence on behalf of the Agency, that the Commission was in dereliction of its duties and responsibilities when it accepted only the Agency's statement as to this ultimate fact when minimal effort through interrogatories could have readily supported the Agency's contention. For example:

(i) Why did not the Commission ask the Agency when the functions were transferred? Petitioner was performing all his functions as of June 16, 1972, his separation date (Appendix Page A-64) and, therefore, to date of separation no functions had been transferred. If the Agency had been planning for six months for this RIF does it not seem logical that Petitioner would have been contacted to assist in the change over?

(ii) Why did not the Commission ask the Agency for a copy of the renegotiated contract with RCA? RCA was not going to assume these additional duties without compensation.

(iii) Why did not the Commission ask the Agency for a complete list of functions transferred and those retained? The Agency stated that some of the functions were retained, and under the regulations Petitioner has the right to transfer with his functions. 5 C.F.R. 351.301.

The "record" does not reveal any answers to these questions. In fact, it was the duty of the Commission to ascertain the functions transferred it being the Governmental body responsible for protecting government employees from arbitrary and capricious action by an agency. The Commission violated the law in this regard. 5 USC 1302(b). Petitioner alleges that to make inquiry as suggested asks no more than would be required of any ordinary, prudent trier of fact.

B. *Petitioner's Evidence*

It has been pointed out that the Agency submitted no evidence in support of its position. Petitioner, on the other hand, submitted substantial evidence to show that the Agency's action was arbitrary and capricious. Petitioner's evidence consisted of the following:

(1) Affidavit of deceit perpetrated by Agency. Appendix Pages A-59 - A-62.

(2) Affidavit that his job functions were being performed by him and had not been transferred to RCA as the Commission alleged at date of severance. Appendix Page A-64.

(3) Affidavit, job description documentation and an excerpt from the GSA contract creating the presumption that for the most part Petitioner's job functions were not transferable to an outside contractor. Appendix Pages A-38 - A-56, A-62 - A-64, A-71 - A-72.

(4) Copies of budget forecast showing no schedule reduction in the AUTEC management group. Record 248, 254.

Job description analysis submitted by Petitioner indicates that one of his primary responsibilities consisted of monitoring performance of the outside contractors (RCA, IBM, Control Data Corporation). Appendix Pages A-38 - A-45. The function of monitoring cannot be transferred to the one monitored! Furthermore, certain of Petitioner's functions must be performed by the Government under the GSA Contract and cannot be transferred to RCA. Appendix Pages A-62 - A-64, A-71.

RCA operated the equipment supplied by Control Data and IBM. Since RCA also is an equipment vendor as well as operator, there is a conflict of interest between RCA and IBM and Control Data. Is it likely that monitoring functions would be transferred to a competitor?

Petitioner's monitoring functions are set forth in detail in the Appendix, Pages A-38 - A-45. They are also summarized in the Appendix, Pages A-62 - A-64. In essence, Petitioner's monitoring responsibilities included:

(1) Reviewing data for accuracy and follow-up on corrections of errors made by RCA.

(2) Comparing invoices received from IBM and Control Data with the GSA contract and certifying complainace thereto. This function is required of a Government employee under the GSA contract and cannot be transferred.

(3) Examining equipment failure reports to determine if the Government was entitled to a refund or credit. Again this function cannot be transferred to an outside contractor.

(4) Monitoring installation of new equipment purchased from an outside contractor to determine if operational and in conformance with the GSA contract. This function under the GSA Contract is required to be performed by the Government.

(5) Monitoring performance of RCA, Control Data and IBM and recommending monetary awards for outstanding work.

(6) Establishing equipment maintenance schedules under the GSA contract, also required of the Government under the GSA Contract.

As previously pointed out Petitioner was performing all his duties to date of separation on June 16, 1972. Appendix Page A-64. The Agency's reply is dated July 28, 1972 and this reply stated that Petitioner's functions were transferred to RCA. Appendix Page A-17, A-24. Therefore, the Agency asks us to believe that Petitioner's functions were transferred to RCA in a little over one month when from date of the RIF notice (April 7, 1972; Appendix Page A-16) to date of separation or approximately two months no functions were transferred nor was Petitioner asked to nor did he assist in any transfer. The allegation by the Agency that Petitioner's functions were transferred to RCA before July 28, 1972 is not credible.

Petitioner further presented evidence to the Commission as to Agency personnel forecasts. Since there were 66 employees when Petitioner was separated and the forecast budgeted 76, they did not indicate any transfer of functions. Record 249, 254.

In summary, the Agency presented no evidence that Petitioner's functions were transferred to RCA as justification for the RIF. To the contrary, Petitioner presented substantial, credible evidence that his functions could not be transferred for certain functions were required to be performed by the Government under the GSA contract and all functions associated with monitoring and approving incentive awards could not be transferred to the one monitored or to a possible recipient of an award.

(2) *Unduly Narrow Competitive Level*

Approximately one week after receiving his RIF notice Petitioner was informed by the Agency that he could not exercise any retention rights, that is, he was not eligible to "bump" any lower preferential ranking employee being retained. Appendix Page A-66. The regulations establish a priority system whereby a preferential employee may displace other employees with a lower ranking. 5 CFR Part 351, Subpart E and F. Pertaining to Petitioner's retention rights, his competitive level was established as "Physicist (General), GS-1310-13" (Appendix Page A-16); and his competitive area was limited to "West Palm Beach" (Appendix Page A-22). However, Petitioner held the highest retention standing classification, IA, within his competitive level and area. Appendix Page A-16.

Relative to Petitioner, the Agency presented a list of job positions with the Agency at West Palm Beach then held by lower retention standing employees, and concluded that there was no position that was similar to the one held by Petitioner. Appendix Pages A-19, A-21. Although no position of physicist appears on this list, Petitioner alleges that he also competes with: (1) electronics engineers, (2) operations research analysts, (3) electrical engineers, and (4) general engineers. With regard to the Operations Research Analysts position the Agency contended that although Petitioner met the minimum requirements for the position of operations research analysts it would require two years additional training to qualify Petitioner for the particular position held by a lower retention standing employee in West Palm Beach. Appendix Page A-20.

The Commission found that Petitioner was unable to displace electrical or electronics engineers on the list as the functions of a physicist are not mutually interchangeable. It further held that the regulations state that he must be able to step into a position without undue interruption and, therefore, Petitioner is not qualified for that particular Operations Research Analyst position then held by a lower retention standing employee. Appendix Pages A-6, A-7 - A-8.

The Regional office of the Commission held that the position of physicist is sufficiently different from any other occupational series then held by a lower retention standing employee and Petitioner could not exercise any retention rights. Appendix Page A-11.

Petitioner presented substantial, credible evidence, uncontradicted by any evidence presented by the Agency that he is qualified as an electronics, electrical, general engineer or as an Operations Research Analyst. A summary of Petitioner's work experience is as follows:

RCA (Record 69-74)

1959 — 1960	Communications Engineer
1960 — 1961	Mathematician
1961 — 1962	Analyst

Civil Service — Air Force (Record 65-68)

1964 — 1966	Mathematician
1966 — 1967	Physicist

Civil Service — U.S. Navy — AUTEC (Appendix Pages A-45 - A-56.

1967 — 1972 Physicist

Petitioner holds a bachelors degree in mathematics and has completed approximately 125 credit hours in excess of the requirements for that degree in physics, higher mathematics and computors of which 52 hours were at the graduate level. Record 263, 264.

Petitioner's job description with the Agency at time of separation was "Electronics Engineer/Physicist (Data Systems)" which includes all systems performed by the Agency in radar, optical, in-water and data transmission. In addition to the monitoring functions his technical functions consisted of serving as an engineering consultant reporting to an electronics engineer which required a background in electronics engineering and data systems. Appendix Pages A-45 - A-56)

The head of the Range Development and Operations Divisions describes Petitioner as a consulting Physicist in the area of Data Systems pertaining to optical and acoustics radiation phenomena. Petitioner was also responsible for consulting in the systematic solution of underwater space and time problems. Appendix Page A-50.

Therefore, in summary, to date of separation Petitioner had approximately twenty years experience in various capacities as an engineer, mathematician and physicist in all data systems.

Furthermore, he had completed over 125 credit hours of college level work beyond the bachelors degree in this area. Petitioner presented substantial, credible evidence that he was qualified for the position of general, electrical and electronics engineer, especially since his job position to date of severance was that of an electronics engineer. He likewise qualified for the operations research analysts job, needing no substantial additional training as he has been associated with those activities for over ten years and developed some of the techniques in force at his separation. Appendix Page A-69. His evidence establishes that such positions are mutually interchangeable, that Petitioner could have been assigned to any one without unduly interrupting the work schedule contrary to the finding of the Commission. The Commission relied solely upon the Agency's reply which again consisted of nothing more than unsubstantiated statements totally contradictory to the evidence.

(3) *Unduly Narrow Competitive Area*

Reiterating the finding above that the Agency and Commission precluded Petitioner from "bumping" other lower retention status employees since he was the only physicist in the West Palm Beach area, Petitioner likewise contends that the restriction of the competitive area to West Palm Beach was likewise unduly narrow. Petitioner alleges that Andros Island and West Palm Beach should have been one competitive area. The Commission rejected Petitioner's assertion on the grounds that Andros Island was not within the "local commuting area" of West Palm Beach and, therefore, not in the same "competitive

area" as defined in 5 CFR 351.402. Appendix Page A-6. Petitioner contended that the Commission erred as to the definition of competitive area for the regulations define it to be one in which employees are assigned to a "single administrative authority". 5 CFR 351.402. The standard is met if it covers a local commuting area which means the geographic area that constitutes one area for employment. The definition states as an example it may be the area where people can reasonably be expected to travel back and forth daily but is not confined to this situation. 5 CFR 351.203(d).

AUTEC was a single administrative authority operating in West Palm Beach and Andros. Appendix Page A-27. There was extensive commuting between the two areas but notwithstanding this is not the criterion. The Commission's definition thus is contrary to the regulations constituting an abuse of its authority, as the Agency should have established a competitive area which encompassed the one administrative authority, viz., AUTEC.

C. *EVENTS SUBSEQUENT TO TERMINATION (Reemployment)*

On or about May 1972 the Agency interviewed Petitioner for the purpose of determining his opportunities for reemployment, and he was qualified for:

Mathematician	GS-12 and GS-13
Physicist	GS-12 and GS-13
Operations Research Analyst	GS-12 and GS-13

Digital Computor System
Administrator GS-12 and GS-13

Appendix Page A-66.

During that interview Petitioner specifically requested that his name be placed on all Government employment registers in Florida, and was assured by the Agency that they would comply with his request. Appendix Page A-66. In addition, Petitioner filed with the Agency a form requesting that he also be considered for all vacancies in AUTEC, West Palm Beach and Andros Island; and NUSC in Newport, Rhode Island, New London, Connecticut, Patrick Airforce Base, Florida and Bermuda. Appendix Page A-73.

In its reply, the Agency alleged that in addition to "regulatory placement actions, placement consideration was extended to other NUSC competitive areas at appellants' request" in addition to referrals through the Department of Defense. Also the Agency alleged that it will make "vigorous effort" to assist terminated employees with skills and training to assist them in placement efforts with NUSC, and in other Naval and Federal activities in and outside the commuting area. Appendix Pages A-23, A-25.

On or about May, 1972, a lower retention status employee (Mr. Brackett), also subject to the RIF action, was offered a job at Cape Kennedy as a Mathematician GS-12. Petitioner asserts that since he is a veteran or preferential employee with a higher retention ranking, qualified for this position, the Agency should have first made this offer to him.

Furthermore, Mr. Brackett, was later transferred back to West Palm Beach. Appendix Pages A-67, A-76.

(1) *Violation Law and Regulations*

The Commission's decision, pertaining to (1) Petitioner's allegation that his reemployment rights were violated due to the fact that the Agency was advertising job vacancies for those positions which it qualified Petitioner for reemployment but made no offer and (2) to the fact that a lower retention standing employee was reemployed in preference to Petitioner, states that an employee is not entitled to assignment in another competitive area in a RIF nor is an Agency required to fill a vacancy under 5 CFR 351.201(b). Appendix Page A-8.

Referring to point (1), that an employee is not entitled to assignment in another competitive area in a RIF, this conclusion is totally without legal support or justification. The Commission cites no authority. However, to the contrary, the law and regulations directly hold that reemployment rights are extended to other competitive areas.

First, under Title 5 of the United States Code, the law requires that the Commission shall establish and enforce regulations to provide priority for reemployment to preferential eligibles (veterans). 5 USC 1302(b). Appendix Page A-36. Rule VII, Reemployment Rights, Civil Service Rules, The President of the United States orders the Commission to establish reemployment *rights* (emphasis supplied) for displaced persons in the agencies from which said

employees are released. Executive Order 10577, Rule VII-7.3, March 9, 1960, 25 F.R. 2076. Part 330, subpart B of the Civil Service regulations establishes a priority for filling vacancies in an agency and in summary they require that consideration shall first be given to the highest tenure group (I) and within the group preferential (A) over non-preferential (B). 5 CFR 330.101 — 330.204. Subpart C, Part 330 of the regulations establishes a Displaced Employee Program. Eligibles under this program include, among others, those employees subject to a RIF in which an Agency has determined that ". . . he cannot be placed in his competitive area". 5 CFR 330.301(a).

Therefore, in summary, the statute, Executive Order and regulations make no provision for limiting reemployment opportunities to a competitive area. Furthermore, the regulations affirmatively provide that reemployment opportunities be made to a displaced employee under a RIF procedure *outside* his competitive area. Although Part 351 of the regulations does limit reemployment rights to the competitive area, Part 351 and Part 330 together must be construed to give Petitioner, and all displaced employees under a RIF procedure, cumulative rights to reemployment, that is, within and without their respective competitive area. Therefore, the Commission's conclusion that "an employee is not entitled to assignment by reduction in force to another competitive area" directly conflicts with the law and regulations.

The Commission's second point is that although the Agency was advertising job vacancy which it qualified Petitioner for reemployment it is not re-

quired to fill a vacancy. The Commission cites 5 CFR 201(b). Appendix Page A-8. The Commission, deliberately or inadvertently, again misconstrued the regulations, for this particular one says that although an Agency is not required to fill a vacancy if, in its discretion, it does it must follow the remaining regulations under that part which requires that the Agency establish a reemployment priority list in the competitive area. 5 CFR 351.1001. Thus, the regulations do not require filling a vacancy with a displaced person but when it does it must select in retention status order.

Petitioner presented evidence that the Agency at the time of his severance was making public announcements that it was expanding its technical personnel in West Palm Beach. Record 221, 223. In addition, Petitioner presented evidence where the Agency's personnel forecast showed 77 positions whereas there were only 66 people employed at that time or there were 11 existing vacancies. Record 249, 254, 259. Appendix Page A-70. Furthermore, Mr. Brackett, the lower retention status employee hired as a mathematician GS-12 at Cape Kennedy, was transferred back to West Palm Beach. Appendix Page A-67. Thus, Mr. Brackett was "reemployed" in the competitive area over Petitioner with a higher retention standing which directly contradicts the requirements of the regulations.

In conclusion, Petitioner presented substantial, credible evidence where the Agency anticipated or did employ or reemploy displaced or other employees without giving consideration to Petitioner's preferen-

tial reemployment rights. Holding the highest rank and likewise being a veteran (IA) he held priority for reemployment. Yet, no job offer has been made to him.

(2) *Bad Faith*

The regulations require that both Agency and the Commission establish reemployment programs which as a minimum shall assure reemployment consideration in priority order. 5 CFR 330.302-304. The Agency stated in its reply that Petitioner was considered for reemployment in other competitive areas, and that "vigorous effort" will be made to assist Petitioner in obtaining requisite skill and training to qualify him for positions within the Agency, in other Naval and Federal activities, in and outside the commuting area. Appendix Pages A-23, A-25. Thus, as a minimum, the Agency was required to consider Petitioner for all vacancies in physics, electronics engineering, mathematics, operations research, digital systems; and the Agency's reply infers they did so but found no opening. Petitioner, on the other hand, presented substantial evidence that numerous employment opportunities were available. Appendix Pages A-57, A-58, A-76. Considering Petitioner's years of experience in these technical areas in conjunction with his extensive formal education does it not imply bad faith on part of the Agency when it found Petitioner unqualified for *any* job opening in his area of expertise? Furthermore, no training nor assistance for job qualification was offered to him. Appendix Page A-68.

The Commission, likewise, is obligated to provide reemployment opportunities under a priority program, and as indicated above opportunities are not restricted to any particular geographic location. 5 CFR 330.303-306. However, Petitioner was informed by the Commission that he was placed on two employment registers only, Huntsville and Mobile. Appendix Page A-74. Due to job terminations in these two locations, Petitioner considered his reemployment opportunities nil. Appendix Page A-67.

Conclusion

(1) The Commission's decision holding that a displaced employee under RIF procedure is not entitled to reemployment in another competitive area is in contradiction to the law and regulations.

(ii) The Commission's decision that an Agency is not required to fill a vacancy is misleading and incomplete. It fails to include the situation where an agency does fill a vacancy and under these circumstances it is obligated to give priority to displaced employees in retention standing order. Petitioner presented substantial evidence that the Agency did or intended to reemploy others in preference to Petitioner who held preferential priority.

(iii) Petitioner also presented substantial, credible evidence that the Agency acted in bad faith. The Agency is obligated to establish a reemployment program. The Agency stated it considered Petitioner for vacancies within the Agency as well as other Naval and Federal activities, in and outside his commuting area.

Yet, during this period the Agency was advertising numerous openings in positions it qualified Petitioner, but made him no job offer. The Agency further stated it would make vigorous effort to assist Petitioner in qualifying and training him for other jobs, but to date has offered Petitioner no opportunity for training.

(iv) Petitioner also presented substantial, credible evidence that the Commission acted in bad faith in that it likewise is obligated to establish a reemployment program unrestricted as to geographical location. However, the Commission placed Petitioner on two placement registers only, Huntsville and Mobile, where the possibilities for reemployment were limited.

Point I

The Order Of The Court Of Claims Is In Conflict With Federal Statutes, Executive Rulings, And Civil Service Regulations.

The legislative scheme embodied by Federal statutes, Executive rulings and Civil Service regulations has as its primary purpose the protection of United States Government employees against arbitrary and unjust action by an employing Government agency or department, and affording preferential employees (normally veterans) preference in appointment, retention, reinstatement and reemployment.

Congress has enacted a statute which grants to the President of the United States the power to promulgate rules for the administration of Governmental competitive service. 5 USC 1301. Congress commands the Civil Service Commission to prescribe regulations, subject to Presidential rules or Executive Orders, to implement the administration of the competitive service; and further commands the Commission to prescribe and enforce regulations to implement Congressional policy of providing preferential employees preference in appointment, retention, reinstatement and reemployment. 5 USC 1302 (a), (b). Appendix Page A-36.

Pursuant to the Presidential rule making power, President John F. Kennedy issued an Executive order directing each Government department and agency as well as the Commission to establish procedures and regulations for the purpose of safeguarding Government employees against arbitrary or unjust discharge. Executive Order No. 10987, *Agency Systems for Appeals From Adverse Action*, Jan. 18, 1962, 27 F.R. 550. Therefore, each Government employee is protected from arbitrary and unjust severence, and each preferential employee in addition to protection from arbitrary and unjust termination is eligible for preferential consideration in appointment, retention, reinstatement and reemployment.

Petitioner alleges in his facts that his discharge from competitive service was arbitrary and unjust; and as a preferential employee, in violation of the laws and regulations, he was not granted preference by the Agency nor the Commission in retention, reinstate-

ment and reemployment. The Agency and the Commission's actions in this regard are arbitrary and unjust for the following reasons.

(A) The Agency and Commission did deliberately deceive Petitioner which directly contributed to his separation from Government service and denial of his reemployment rights.

(B) The Commission's decision, upheld by the Court of Claims, was not made on the basis of any credible evidence to support the Agency's reasons for discharge and failure to reemploy.

(C) The Commission's decision, upheld by the Court of Claims, is in violation of Federal statutes, Executive rulings and Civil Service regulations.

(A) *Deception*

Deceptive statements and acts of the Agency and Commission as appear in detail under the Statement of Facts are summarized as follows:

1. The Agency assured Petitioner that if he transferred to West Palm Beach his job was secure when it knew that he was slated for discharge. Petitioner would not have requested reassignment had he been so informed, thus would not have been subject to the RIF procedure. Brief, Page 8-12.

2. The Agency, although stating Petitioner was considered for reemployment, advertised vacancies

for positions it qualified Petitioner for reemployment, but made no job offer to him. Brief, Pages 23-30.

3. The Agency misrepresented Petitioner's qualifications which precluded him from exercising his preferential retention rights. Brief, Pages 19-22.

4. The Agency deliberately hired a non-veteran for a job which it qualified Petitioner in preference to Petitioner who under the law and regulations held priority. Brief, Pages 24-25, 27.

5. The Agency stated it would make vigorous effort to qualify and to train Petitioner for other positions but offered him no training. Brief, Pages 24, 28.

6. The Commission, under its reemployment program, in violation of the regulations, placed Petitioner on two job registers only, Huntsville and Mobile, directly contrary to Petitioner's request. These places were considered by Petitioner to have nil employmental opportunities. Brief, Page 29.

7. The Commission and the Agency failed to furnish Petitioner with a copy of the Agency's reply to his appeal. Also the Agency told Petitioner that it was abolishing his position but replied to the Commission that it transferred his functions to RCA. Brief, Pages 5 and 6.

(B) *Decision of Commission and Order of Court of Claims Totally Devoid of Evidentiary Support*

The Statement of Facts reveal that the only evidence submitted by the Agency to the Commission consisted

of an unsworn statement. The Commission predicated its decision solely upon this statement, and the Court of Claims held that the administrative action was supported by "substantial evidence". Petitioner, on the other hand, did present substantial, credible evidence consisting of documents, letters, instruments, and sworn affidavit contradicting the Agency's allegations. Brief, Pages 13-18.

Where a discharge has been unsupported by substantial, credible evidence it will be regarded as arbitrary and invalid. *Urbina v. U.S.*, 180 Ct. Cl. 194 (1967). *Saggau v. Young*, 138 F. Supp. 140 (D.C. D.C., 1956). Examples of substantial evidence consist of testimony of two witnesses and affidavits of three affiants (*Williams v. Brown*, 384 F. 2d 981 (C.A. D.C., 1967)); copy of transcript, evidentiary letters prior to discharge stating cause, testimony before a trial examiner by numerous witnesses accompanied by a written summary. *Gordon v. Bright*, 306 F. Supp. 252 (D.C. Okla. 1968).

Since Petitioner was not afforded a hearing by either the Agency or the Commission there is no transcript of testimony. Neither is there any documentary evidence, letters nor sworn statements supporting the Agency's action. Predicating Petitioner's discharge upon no evidence constitutes an arbitrary discharge which is unlawful.

(C) *Decision of Commission and Order of Court of Claims Contrary to Law and Regulations*

The Statement of Facts reveal that the Agency established a competitive area and competitive level for

purposes of retention so narrow and contrary to the regulations, as to effectively preclude Petitioner from exercising his preferential retention rights. Brief, Pages 19-23. The Commission also erred under the law and regulations in holding that Petitioner was unable to exercise his preferential reemployment rights. Brief, Pages 25-28. Neither the Agency nor the Commission granted Petitioner a hearing. Brief, Page 13.

When a Government employee has been deprived of his rights under the law and regulations it must be regarded as if the employee has not been lawfully discharged. *Saggau v. Young*, supra; *Williams v. Brown*, supra; *Baxter v. United States*, 136 F. Supp. 748, (Ct. Cl., 1954), cert. denied 1/9/56, 76 S. Ct. 308. Government employees subject to an adverse action are entitled to a hearing either before the Agency responsible for the discharge or the Commission. Exec. Order 10987, supra; *Williams v. Brown*, supra; *Sampson v. Murray*, 94 S. Ct. 937 (1974).

In conclusion, a discharge which is based on deception, not supported by any evidence, and contrary to the law and regulations is arbitrary and unjust, thus unlawful.

Summary Judgment

The Court of Claims ruled in favor of Respondent's motion to dismiss and for summary judgment. Brief, Page 7. Petitioner alleges that Respondent's motion for summary judgment was improper.

If the judgment sought shows, on pleadings, depositions, answers to interrogatories, affidavits, that there is no genuine issue as to a material fact, the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56(c). The party opposing the motion must set forth specific facts showing there is a genuine issue for trial, and where such materials raise inferences it is the duty of the trial court to view such inferences in favor of the party opposing the motion. Federal Rules of Civil Procedure, Rule 56(e). *United States v. Diebold, Inc.*, 82 S. Ct. 993 (1962).

Reiterating the points raised above, the Agency presented no evidence (depositions, answers to interrogatories, affidavits) in support of its allegation; yet Petitioner presented substantial, credible evidence raising a strong inference that his discharge and denial of reemployment was unlawful. Therefore, the Court of Claims erred in granting Respondent's motion for summary judgment.

Point II

The Question Involved Is An Important Issue Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This Court has not entertained any issues raised in this Petition for Writ of Certiorari since enactment of Executive Order 10987 in January, 1962. The Court did recently review one case involving a very narrow issue of law, not herein raised, viz., does loss of pay and reputation by a discharged employee constitute

irreparable injury to justify issuance of a temporary injunction. *Sampson v. Murray*, supra.

Petitioner asserts that the questions of arbitrary and unjust discharge and violations of Congressional policy concerning preference to preferential eligibles in reinstatement, reemployment and retention are equally important as the question decided in *Sampson*. This is particularly true since Executive rulings and statutes clearly set forth the philosophy and policy of the Executive and Congressional branches of the Federal Government. The responsibility of enforcing policy and law set forth in the statutes and regulations rests with the Federal courts.

The violations of law and abuse of authority by the Agency upheld by the Commission and Court of Claims are patent in this instance. President Kennedy stated that public interest requires ". . . maintenance of high standards of employee performance and integrity in the public service . . ." to promote the efficiency of the service. In furtherance of this goal, Government employees, who number nearly three million, are also to be protected against arbitrary and unjust action; and quick correction of improper, adverse acts will assist in maintaining a high level of employee morale and improve employee-management relations. Executive Order 10987, supra.

The rights of Government employees as well as all employees in their employment capacity are paramount. As Justice Douglas stated in the *Sampson* decision:

> Employability is the greatest asset most people have. Once there is a discharge from a prestigious federal agency, dismissal may be a badge that bars the employee from other federal employment . . . a discharge on the basis of an employee's lifetime record or on the basis of captious or discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life . . . There is no frontier where that employee may go to get a new start. We live today in a society that is closely monitored . . . Discharge from the Federal service or resignation under fire become telltale signs of undesirability. *Sampson v. Murray*, supra at 955, 956.

Is not Petitioner the perfect example of this statement who, with over 29 years of Government service at approximately 50 years of age, finds himself unemployable despite his outstanding record and achievements in the technical and scientific world and who was so motivated towards excellence that he educated himself far beyond the minimum required for his job?

However, while Petitioner's plight is obvious in reality each one of us citizens and residents of this United States have suffered. Is not the purpose of the three million Government employees to serve us all? Is it not in our interest that we are served by the most skilled, dedicated, loyal members of our society? Are not all of us harmed when some supervisor, for whatever reason, causes us to lose the services of one such employee?

Is this case one of those rare occurrences unlikely to be repeated in the future which this Court can ignore? This conclusion is readily dispelled by reference to the "Malek Manual" published by the Federal Times in installments between October 16th and December 18th, 1974. As the Times reports, this manual was widely used by various agencies to subvert the merit system, to dodge Federal personnel law and to promote political patronage. Federal Times, Oct. 16, 1974, at 12, Col. 1. The manual index includes a section entitled "Techniques for Removal Through Organizational or Management Procedures" (Federal Times, supra at 13, Section III, 3.) which is headlined by the paper as "How to Make Your 'Employee-Victim' Quit". This section is reported in full in the December 8, 1974 edition Page 12.

President Ford has also expressed his concern over abuse of the merit system and patronage in Government service and has issued the following statement for heads of departments and agencies:

> *Memorandum for Heads of Departments and Agencies*
> Whatever else, recent experience has proven one thing about the federal government: It can continue to function and move ahead even under the most difficult circumstances. This is due chiefly to more than two million career civil servants who, day-in and day-out, give of themselves in a thoroughly dedicated and efficient manner to assure this continuity.
>
> These men and women act in the best traditions of the career civil service which has

demanded from them for more than 90 years the highest degree of professionalism and competence. In return, it has assured them of a competitive system free from political considerations either in their appointments or in their promotions.

I intend to keep it that way — and I call upon you to see to it that the merit principles contained in the Civil Service Act and the personnel laws and regulations are fully and effectively carried out in your department or agency. Appointments and promotions in the career service must not be made on the basis of either politics, race, creed or sex.

I have informed the chairman of the United States Civil Service Commission of my determination to keep the federal career service just that — a career service in which men and women can be accepted in the first place on their ability and promoted on their merit. I ask you to make sure your agency fully complies with both the letter and the spirit of the law in this regard.

GERALD R. FORD

Federal Times, Oct. 9, 1974, at 5, Col. 3.

CONCLUSION

Except under a reduction-in-force procedure, a preferential eligible employee may not be severed from Government service unless for justifiable cause. 5 USC 7512. Appendix Page A-37. The Agency did not

discharge Petitioner for cause. To the contrary. Petitioner's skills, dedication and loyalty are reflected in part by his voluntary participation in the Government incentive awards program. On or about March. 1972 or one month preceding his discharge Petitioner submitted a work improvement suggestion which in the first year of implementation would result in a $1 million cost saving, and he has been recipient of other awards in the past. Appendix Page A-65. On another occasion his superior informed him that the President of the United States commended the work of their group in processing in-water data on missile impacts. Appendix Page A-69. Therefore, Petitioner's zeal in serving our country is evident up to the moment of his termination.

A total of 5 individuals were subject to RIF in West Palm Beach, one of whom was transferred to Cape Kennedy. Four, including Petitioner, were discharged. The Agency personnel forecast for West Palm Beach totalled 77 employees, and overall the Agency employed in excess of 3,000 people. Record 248, 254. Yet, neither the Agency nor the Commission was able to find suitable employment for Petitioner inside the Agency employing some 3,000 nor outside the Agency in Government service employing nearly 3 million.

Petitioner states that the reorganization under the RIF procedure was a ploy to circumvent the law to the detriment of Petitioner and the people of the United States. Petitioner asks this Court to grant certiorari and reverse the Order of the Court of Claims.

Respectfully submitted,

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PROOF OF SERVICE

I, WILLIAM J. BEISWANGER, attorney of record for James O. Ming, Petitioner, herein depose and say that I served by mail three copies of this petition for Writ of Certiorari to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530, Respondent herein on this ____ day of June, 1975.

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